Supreme Court, U.S.
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No. 07-

IN THE

Supreme Court of the United States

VASILE VALY ROSCA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

LARRY A. HAMMOND
Counsel of Record
MARK P. HUMMELS
OSBORN MALEDON, P.A.
Attorneys for Petitioner
The Phoenix Plaza
2929 North Central Avenue
Phoenix, AZ 85012
(602) 640-9000

210935

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

This Petition presents the following important question as to which there is a conflict in the Circuits: Whether the Ninth Circuit's "slight connection" standard for upholding a criminal conspiracy conviction against a sufficiency-of-the-evidence challenge comports with the Due Process Clause of the Fifth Amendment, which requires that the government prove every element of a crime beyond a reasonable doubt and mandates that a jury verdict may be sustained on appeal only if supported by substantial evidence.

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PETITION FOR A WRIT OF CERTIORARI

In affirming Petitioner's criminal conviction for knowing participation in a vast, international automobile smuggling conspiracy, the Ninth Circuit improperly held that a defendant may be inferred to have knowingly participated in a conspiracy if the government shows a mere "slight connection" between the defendant and the conspiracy. This lenient "slight connection" standard has been expressly rejected by the Seventh Circuit and presents the same constitutional infirmity as its predecessor, the traditional "slight evidence" rule, which has been widely repudiated but still persists in some Circuits. By upholding conspiracy convictions on the basis of a "slight connection," the Ninth Circuit allows a defendant with a personal relationship to a single conspirator to be improperly convicted of participation in a broad conspiracy even without evidence that he knowingly joined the conspiracy. The Ninth Circuit test is also inconsistent with the case law of other Circuits. The split between the Circuits on this issue thwarts consistent application of the federal criminal conspiracy statute and causes a disparity regarding the substantive rights of criminal defendants from one Circuit to another.

Petitioner, Vasile Valy Rosca ("Rosca"), respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals (App., *infra*, 1a), is unreported. The judgment of the United States District Court for the District of Arizona (App., *infra*, 7a), is unreported.

STATEMENT OF JURISDICTION

The Ninth Circuit Court of Appeals entered its judgment on April 5, 2007. (App., *infra*, 1a) The Court of Appeals denied a timely petition for rehearing on June 26, 2007. (App., *infra*, 7a) The district court had jurisdiction under 18 U.S.C. § 3231. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. V

STATEMENT OF THE CASE

Factual Background. The government claimed Rosca was part of an international smuggling conspiracy involving more than one hundred vehicles. Over the course of three years, participants in this conspiracy allegedly stole vehicles in Canada and the United States, forged false Vehicle Identification Number ("VIN") plates, created counterfeit titles and registration documents, and fraudulently processed paperwork for the vehicles through corrupt insiders at the Arizona Motor Vehicle Division ("MVD") in order to commit insurance fraud or sell the vehicles to third parties in the United States or overseas, primarily in the Middle East and Europe.

The initial indictment charged eighteen conspirators, listed four additional unnamed co-conspirators, and included 180 criminal counts. Most of those named in the original

indictment either pleaded guilty or absconded, leaving only seven defendants named in the final indictment. By the time of trial, following additional guilty pleas, only two defendants remained: Rosca, and Moustapha Lofti Eljammal ("Eljammal"), a Lebanese man living in the United States on asylum, who the government described as the "epicenter" of the international conspiracy. Before sending the case to the jury, the government dismissed all 52 substantive charges against Rosca, leaving in place just one charge alleging that Rosca knowingly joined the overall conspiracy, in violation of 18 U.S.C. § 371.

The Trial. The vast majority of the evidence at trial focused on the criminal acts of Eljammal. Evidence came primarily in the form of testimony from alleged conspirators who had pleaded guilty to joining with Eljammal in a variety of criminal endeavors. These witnesses implicated Eljammal in conspiratorial acts involving the procurement of fraudulent vehicle titles and registrations, VIN-switching, sales of stolen vehicles, and insurance fraud. Yet each of these witnesses testified that, so far as he or she knew, Rosca had played no part in the conspiracy.

The only evidence pertaining to Rosca related to three vehicles: a 2000 Harley Davidson motorcycle, a 2002 Lexus LX470, and a 2001 VW Jetta. Police seized a 2000 Harley Davidson with an altered VIN plate from Rosca's house. A corrupt MVD insider testified that she had falsified title and registration documents for the motorcycle, registering the vehicle in Rosca's name at the direction of Eljammal. But the government conceded that there was no evidence that Rosca had ever possessed the falsified documents, or been involved in any way with the fraudulent registration process. Another MVD insider testified that she fraudulently

prepared title and registration documents in Rosca's name for a 2002 Lexus, which Rosca insured. He later reported the vehicle stolen and filed an insurance claim. The government claimed that Rosca never in fact possessed the vehicle. Finally, Rosca was found driving a 2001 Volkswagen Jetta, owned by the girlfriend of one of Eljammal's co-conspirators. The government argued that the car was going to be falsely reported stolen, although the government conceded that it was unclear if the Jetta was intended for any unlawful scheme at the time Rosca was stopped while driving it.

The jury found Rosca guilty and the district court entered judgment on the verdict and sentenced Rosca to twenty-four months in prison. The Ninth Circuit affirmed in an unpublished Memorandum Decision.

The Ninth Circuit's Decision. In its decision, the Ninth Circuit cited precedent requiring the government to prove each element of a conspiracy beyond a reasonable doubt, but anomalously upheld Rosca's conviction under the lesser "slight connection" standard. The Ninth Circuit precedent requires the government to prove beyond a reasonable doubt, with respect to the *mens rea* element, that "each defendant knew or had reason to know of the scope of the conspiracy and that each defendant had reason to believe that [his] own benefits were dependent upon the success of the entire venture." Pet. App. 1a at 3 (citing *United States v. Brown*, 912 F.2d 1040, 1043 (9th Cir. 1990)). However, after properly articulating this two-prong test, the Ninth Circuit side-stepped this standard in deference to the "slight connection" rule. *Id.* The Ninth Circuit's "slight connection" rule provides that once the government has proven the existence of a conspiracy, "evidence of only a *slight connection* is necessary

to convict a defendant of knowing participation in it." *Id.* (emphasis added) Relying on this impermissible standard, the Ninth Circuit held that the government had provided sufficient evidence for a rational trier of fact to find beyond a reasonable doubt that Rosca had a slight connection to the conspiracy. Pet. App. 1a at 2. But, t e court never considered whether the government had proven beyond a reasonable doubt that Rosca knew the scope of the conspiracy and knew that his benefits were dependent upon the success of the entire venture. *Id.* Instead, the court upheld Rosca's conviction merely upon a finding of a slight connection to the conspiracy, despite the lack of substantial proof of these facts essential to prove the requisite *mens rea.*

The question presented here is whether the Ninth Circuit's "slight connection" standard, which allows the inference that a defendant with a slight connection to an existing conspiracy has knowingly joined in the conspiracy, violates the Due Process Clause of the Fifth Amendment, which requires the government to prove every element of a crime beyond a reasonable doubt.

REASONS FOR GRANTING THE PETITION

The federal circuit courts of appeal are divided as to whether a defendant's knowing participation in a criminal conspiracy may be inferred from a mere "slight connection" to the conspiracy or whether, instead, the government must prove every element of the crime beyond a reasonable doubt. The "slight connection" rule applied by the Ninth Circuit in this case subverts the requirement of proof beyond a reasonable doubt mandated by the Due Process Clause of the Fifth Amendment. The circuit split provides an incentive for forum shopping in multi-circuit conspiracies and

increases the significant advantages that prosecutors already enjoy in a conspiracy prosecution. The circuit courts require guidance from this Court to reaffirm the necessity of proof beyond a reasonable doubt of every element of a criminal conviction. As shown by this case, the Ninth Circuit's "slight connection" rule unconstitutionally allows the courts to uphold a conspiracy conviction absent the necessary proof that the defendant knowingly joined the conspiracy.

I. The Ninth Circuit's "Slight Connection" Rule is a Reincarnation of the Traditional "Slight Evidence" Rule That Has Been Widely Repudiated Because it Unconstitutionally Reduces the Government's Burden of Proof.

The history of the traditional "slight evidence" rule demonstrates that the rule was more the product of accident than carefully developed legal theory. The traditional "slight evidence" rule provided that once there is evidence establishing the existence of a conspiracy, the prosecution need only show slight evidence of a defendant's knowing or intentional involvement in the existing conspiracy. Brent E. Newton, *The Antiquated "Slight Evidence Rule" In Federal Conspiracy Cases*, 1 J. App. Prac. & Process 49, 51 (1999). The rule was created "out of thin air" by the Fifth Circuit in 1930 and courts applied it sporadically until 1970. *Id.* at 51-52. In fact, only 12 cases cited the "slight evidence" rule between 1930 and 1963, and 15 cases between 1963 and 1970. But after 1970, use of the "slight evidence" rule exploded. *Id.* at 52.

The sudden rise in prominence of the traditional "slight evidence" rule was quickly followed by its demise. In the late 1970s, both the Ninth and Fifth Circuits banished the

"slight evidence" rule out of concern for the increased risk it presented of wrongful convictions. *Id.* However, these two Circuits took very different approaches in crafting a replacement test.

The Ninth Circuit, in *United States v. Dunn*, held that the "slight evidence" rule in its traditional form could be "highly misleading." 564 F.2d 348, 356 (9th Cir. 1977). The court warned that, if applied literally,

> [the "slight evidence" rule] would vitiate the Government's ever-present burden of proof, the requirement that guilt must be proved to a moral certainty and beyond a reasonable doubt, the presumption of innocence, the rule that all doubts must be resolved, and equally plausible inferences drawn, in favor of defendants, and other traditional foundations of our nation's system of criminal justice.

Id. But, instead of abolishing the rule altogether, the Ninth Circuit merely re-characterized the traditional rule. The court emphasized that the word "slight" properly modifies a defendant's *connection* to the conspiracy, rather than the necessary *quantum of evidence. Id.* at 357. According to *Dunn*, the proper statement of the rule is that "[o]nce the existence of a conspiracy is established, evidence establishing beyond a reasonable doubt a connection of a defendant with the conspiracy, even though the connection is slight, is sufficient to convict him with knowing participation in the conspiracy." *Id.* This reformulation of the rule, however, shares the same vices as its predecessor.

Although the Ninth Circuit purports to recognize that a defendant cannot be convicted without proof beyond a reasonable doubt, its "slight connection" rule falls short of this imperative with respect to the *mens rea* element of a conspiracy charge. To convict a defendant of criminal conspiracy, the government must prove a *mens rea* of "knowing participation" in the conspiracy. *United States v. Brown*, 912 F.2d 1040, 1043 (9th Cir. 1990). Under the "slight connection" rule, however, the Ninth Circuit will uphold the conviction of a defendant who is only peripherally connected to a broad conspiracy, so long as the attenuated *slight connection* is proven beyond a reasonable doubt. The "slight connection" rule thus substitutes proof beyond a reasonable doubt of a *slight connection* to the conspiracy for proof beyond a reasonable doubt of a defendant's *knowing participation* in the conspiracy — the appropriate *mens rea* requirement.

In contrast, the Fifth Circuit banned the "slight evidence" rule without the unconstitutional back-sliding of the Ninth Circuit approach. In *United States v. Malatesta*, the Fifth Circuit resoundingly rejected the traditional "slight evidence" rule. 590 F.2d 1379 (5th Cir. 1979). It held that "[s]ince knowledge, actual participation, and criminal intent are the necessary elements of the crime of conspiracy, the government must, of course, prove each of those elements beyond a reasonable doubt." *Id.* at 1381. The Fifth Circuit reasoned that requiring proof beyond a reasonable doubt of *every element* of a conspiracy is necessary for compliance with this Court's mandate that a criminal conviction not be upheld on appeal absent substantial evidence of guilt. *Id.* at 1382 (citing *Glasser v. United States*, 315 U.S. 60, 80, 62 S. Ct. 457, 469 (1942)). The Fifth Circuit expressed regret that the "slight evidence" rule had "been allowed to worm its

way into the jurisprudence of the Fifth Circuit" and unequivocally "banished" the rule from all future Fifth Circuit appeals. *Id.*

II. The Circuit Courts of Appeal Are Split as to Application of the "Slight Evidence" Rule and its Evolution Into the "Slight Connection" Test.

The Ninth Circuit's "slight connection" standard is consistent with case law in the First, Fourth, Sixth and Tenth Circuits, but contrary to published decisions of the Third, Fifth, Seventh and Eleventh Circuits, which have refused to dilute the requirement that a defendant's knowing participation in a criminal conspiracy must be proven beyond a reasonable doubt. This split between the Circuits means that a criminal defendant in one part of the country may be convicted of a violation of the federal criminal statute for conduct that would not constitute a violation if prosecuted in another Circuit. Such disparate treatment runs counter to the goal of judicial uniformity and equality before the eyes of the law.

Like the Ninth Circuit, the First, Fourth, Sixth, and Tenth Circuits have all determined that once the existence of a conspiracy is established, a defendant's knowing participation in that conspiracy can be inferred when the defendant has a "slight connection" to the conspiracy. *See United States v. Marsh*, 747 F.2d 7, 13 (1st Cir. 1984); *United States v. Burgos*, 94 F.3d 849, 862 (4th Cir. 1996); *United States v. Braggs*, 23 F.3d 1047, 1051 (6th Cir. 1994); *United States v. Whitney*, 229 F.3d 1296, 1301 (10th Cir. 2000). These Circuits generally purport to require proof beyond a reasonable doubt of every element of a crime, but adhere to a rule that allows an inference of knowing

participation from proof of a mere "slight connection" to an established conspiracy. This "slight connection" test thus replaces the appropriate requirement of substantial proof to uphold a conviction challenged on appeal for insufficiency of the evidence.

In contrast, the Seventh Circuit has expressly repudiated the Ninth Circuit's "slight connection" test. In *United States v. Durrive*, the Seventh Circuit rejected both the "slight evidence" rule and its "slight connection" reformulation by the Ninth Circuit. 902 F.2d 1221, 1227-28 (7th Cir. 1990). The Seventh Circuit recognized that the "slight connection" rule shares the "same dubious heritage" as the "slight evidence" rule, which it recognized as a "poorly articulated standard of . . . suspect lineage." *Id.* In *Durrive*, the Seventh Circuit put an end to the "infestation" of the "slight evidence" and "slight connection" rules within the Circuit's criminal conspiracy cases. *Id.* at 1228-29. Instead, the court adopted the generally applicable standard that "when the sufficiency of the evidence to connect a particular defendant to a conspiracy is challenged on appeal, 'substantial evidence'" is required to uphold the conviction. *Id.* at 1228. While acknowledging that the phrase "slight connection" is "arguably" a fair articulation of the potential criminal culpability of a minor player in a conspiracy, the court recognized that the phrase as historically applied risked impermissibly diluting the government's burden to prove every element of guilt beyond a reasonable doubt. *Id.* at 1226.

The Third, Fifth, and Eleventh Circuits have strictly adhered to the constitutional requirement of affirming convictions on appeal only upon substantial evidence proving each element of the crime. *United States v. Brodie*, 403 F.3d 123, 134 (3d Cir. 2005); *Malatesta*, 590 F.2d at 1382; *United*

States v. Baker, 432 F.3d 1189, 1231-32 (11th Cir. 2005). The Third Circuit has emphasized that, because conspiracy cases are usually based on circumstantial evidence, the courts must give "close scrutiny" to the sufficiency of the government's evidence in a conspiracy case. *Brodie*, 403 F.3d at 134. Accordingly, a "[c]onspiracy cannot be proven by piling inference upon inference where those inferences do not logically support the ultimate finding of guilt." *Id.* (internal citations omitted).

Likewise, the Fifth and Eleventh Circuits also require every element of a crime to be proven beyond a reasonable doubt. Rather than allowing proof of a "slight connection" to substitute for the required proof of knowing participation, these Circuits properly focus on whether the defendant's *mens rea* has been proven beyond a reasonable doubt. *Malatesta*, 590 F.2d at 1382; *United States v. Baker*, 432 F.3d 1189, 1231-32 (11th Cir. 2005).

Other circuits have chosen still different tests. The Second Circuit, for example, holds somewhat vaguely that once the existence of a conspiracy has been established, "evidence sufficient to link another defendant with it need not be overwhelming." *United States v. Provenzano*, 615 F.2d 37, 45 (2d Cir. 1980). The Eighth Circuit, on the other hand, appears to have one foot planted on each side of the fence. In *United States v. Lopez*, the Eighth Circuit states that "a defendant may be convicted for even a minor role in a conspiracy, so long as the government proves beyond a reasonable doubt that he or she was a member of the conspiracy," but then cites to cases employing the "slight connection" standard. 443 F.3d 1026, 1030 (8th Cir. 2006). The Circuits are thus clearly in need of guidance from this Court to resolve this split of authority.

III. The Ninth Circuit "Slight Connection" Test Fails to Comport With the Due Process Requirement of Proof Beyond a Reasonable Doubt of Every Element of a Criminal Conviction.

The government enjoys substantial substantive and procedural advantages in criminal conspiracy prosecutions that impose a "particularly heavy burden" on the defendant. *United States v. Alvarez*, 610 F.2d 1250, 1254 (5th Cir. 1980). The prosecutor's advantages include, *inter alia*, "the inherent vagueness of the crime itself;" the ability to introduce hearsay statements of co-conspirators; and "the disposition of all courts ... to admit circumstantial evidence on somewhat relaxed standards of relevance on the rationale that the clandestine nature of the crime makes it unprovable in any other fashion." *Id.* Thus, conspiracy has been called the "darling" of prosecutors. *Harrison v. United States*, 7 F.2d 259, 263 (2d Cir. 1925). Courts recognize that "the conspiracy doctrine is inherently subject to abuse and that the government frequently uses conspiracy to cast a wide net that captures many players." *United States v. Evans*, 970 F.2d 663, 668 (10th Cir. 1992). Conspiracy convictions therefore require close scrutiny.

The Due Process Clause of the Fifth Amendment provides a safeguard against convictions based on insufficient evidence. The Due Process Clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 1072-73 (1970). In the context of criminal conspiracy, these "necessary" facts include the fact of the defendant's knowing participation in the conspiracy.

The requirement of proof beyond a reasonable doubt "operates to give 'concrete substance' to the presumption of innocence, to ensure against unjust convictions, and to reduce the risk of factual error in a criminal proceeding." *Jackson v. Virginia*, 443 U.S. 307, 315, 99 S. Ct. 2781, 2787 (1979). "[A] society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt." *In re Winship*, 397 U.S. at 363-64.

While virtually all Circuits have recognized that the traditional "slight evidence" rule violates the Due Process Clause, some Circuits still cling tenaciously to its modern reincarnation under the "slight connection" articulation. As Judge Easterbrook insightfully observed in his concurrence in *United States v. Martinez de Ortiz*, however:

> 'Conspiracy' is a net in which prosecutors catch many little fish. We should not go out of our way to tighten the mesh. Prosecutors have many legitimate advantages in the criminal process. Defendants' great counterweight is the requirement that the prosecution establish guilt beyond a reasonable doubt. References to 'slight evidence' and 'slight connection' reduce the power of that requirement.

883 F.2d 515, 524-25 (7th Cir. 1989) (internal citations omitted). As Judge Easterbrook correctly noted, the "slight connection" rule impermissibly dilutes the government's burden of proof in a conspiracy case.

As employed by the Ninth Circuit and other Circuits, the "slight connection" rule thus circumvents the crucial

protection provided by the Due Process Clause and allows the government to deprive a defendant of liberty based upon a dubious inference. By allowing the courts to infer proof of the required *mens rea*, the Ninth Circuit's "slight connection" rule undermines the constitutional protection of the Due Process Clause and paves the way for wrongful convictions.

IV. This Case Illustrates Why the "Slight Connection" Test Should Be Abolished In All Circuits, Because the Ninth Circuit in this Case Used the Standard to Uphold a Conspiracy Conviction in the Absence of Evidence Showing Knowing Participation.

The Ninth Circuit's application of the "slight connection" test in this case circumvented its own conspiracy case law. Under Ninth Circuit precedent, to convict Rosca for participating in the vast overall conspiracy with which he was charged, the government was required to demonstrate beyond a reasonable doubt that Rosca had actual or constructive knowledge of (1) the scope of the overall conspiracy, and (2) the fact that his own benefits were dependent upon the success of the entire venture. *United States v. Brown*, 912 F.2d 1040, 1043 (9th Cir. 1990); *Daily v. United States*, 282 F.2d 818 (9th Cir. 1960). There was insufficient evidence to prove either of these two prongs beyond a reasonable doubt. But, rather than reverse Rosca's conviction for insufficient evidence, the Ninth Circuit substituted the "slight connection" inference for substantial proof of the two required prongs and improperly upheld the conviction. As a result, Rosca's conviction was affirmed based on his connection to one member of a large group of conspirators, despite the lack of evidence that he knowingly joined the conspiracy.

None of the government's seven co-conspirator witnesses could point to any involvement by Rosca in any aspect of the conspiracy. One witness stated that he did not discuss illegal activities in front of Rosca because he knew that Rosca was not involved in the conspiracy. There was no evidence that Rosca knew anything about the conspiracy's international smuggling activities, or gained any benefit whatever from the success of the overall venture.

Even viewed in the light most favorable to upholding Rosca's conviction, the evidence against him amounted to nothing more than his connection to three vehicles, one attempted act of insurance fraud, and false statements to police in an attempt to protect a long-time friend, Eljammal, who was a central figure in the conspiracy. While this evidence arguably demonstrated that Rosca participated in an isolated case of insurance fraud, and at least temporarily possessed two vehicles connected to other conspirators, it was plainly insufficient to show knowing participation in the overall conspiracy involving more than one hundred vehicles, eighteen conspirators, and acts committed in at least four countries, on three continents. While articulating the two-prong test for knowing participation in the conspiracy, the Ninth Circuit never reconciled its decision with the lack of evidence supporting either prong, but instead simply relied on the "slight connection" standard as a substitute – by inference – for the requisite proof.

Like its predecessor, the "slight evidence" rule that has been widely repudiated, the "slight connection" rule violates the Due Process guarantee of the Fifth Amendment by allowing convictions based upon a lesser standard than proof of every element of the crime beyond a reasonable doubt. The Ninth Circuit's reliance on this lower standard of proof

in this case resulted in the conviction of Rosca despite the lack of evidence that he knowingly participated in or benefited from the vast, multinational conspiracy.

CONCLUSION

For the reasons stated herein, Petitioner respectfully requests that this Court grant review and reverse the ruling below.

Respectfully submitted,

LARRY A. HAMMOND
Counsel of Record
MARK P. HUMMELS
OSBORN MALEDON, P.A.
Attorneys for Petitioner
The Phoenix Plaza
2929 North Central Avenue
Phoenix, AZ 85012
(602) 640-9000

APPENDIX

APPENDIX A — MEMORANDUM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED APRIL 5, 2007

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 05-10608

D.C. No. CR-02-01170-DGC

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

VASILE VALY ROSCA, aka Vaslie Valy Rosca,

Defendant-Appellant.

Appeal from the United States District Court
for the District of Arizona
David G. Campbell, District Judge, Presiding

Argued and Submitted October 18, 2006
San Francisco, California

MEMORANDUM*

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Appendix A

Before BEEZER, O'SCANNLAIN, and TROTT, Circuit Judges.

Vasile Valy Rosca appeals his conviction for conspiracy, in violation of 18 U.S.C. § 371. As the facts and the procedural posture of the case are known to both parties, we repeat them here only as necessary.

I

Rosca first argues on appeal that the evidence was insufficient to prove his connection to the single, overall conspiracy charged in the indictment. "We review sufficiency of evidence challenges to determine whether viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Herrera-Gonzalez,* 263 F.3d 1092, 1095 (9th Cir .2001) (internal quotation marks omitted). Where, as here, the "indictment alleges an overall conspiracy which the defendant joined after its inception, we are faced with two inquiries. The first is whether the overall conspiracy existed. . . . The second inquiry is whether the defendant was connected to the overall conspiracy." *United States v. Umagat,* 998 F.2d 770, 773 n. 3 (9th Cir.1993).

For purposes of this argument, Rosca concedes that the evidence proved a single, overall conspiracy. Furthermore, the district court properly concluded that the government presented sufficient evidence, when viewed in the light most favorable to the government, for a rational trier of fact to find beyond a reasonable doubt the necessary "slight

connection" between Rosca and that conspiracy. We are persuaded that the witness testimony; the recorded interviews with Rosca; the insurance application for the "paper" Lexus connected to the conspiracy; the fraudulent purchase order Rosca used to support his $68,000 fraudulent insurance claim involving that "paper" Lexus; the fraudulent titles created by co-conspirators for the two stolen vehicles Rosca possessed and the "paper" Lexus he insured, all flowing from the conspiracy; as well as other evidence presented at trial offer sufficient support for the district court's conclusion. *See United States v. Brown*, 912 F.2d 1040, 1043 (9th Cir.1990) ("Once the government has established that a conspiracy exists, evidence of only a *slight connection* is necessary to convict a defendant of knowing participation in it. . . . It is sufficient to show that each defendant knew or had reason to know of the scope of the conspiracy and that each defendant had reason to believe that [his] own benefits were dependent upon the success of the entire venture." (internal quotation marks omitted) (emphasis added)); *Daily v. United States*, 282 F.2d 818, 820 (9th Cir.1960) ("That a defendant was aware that he was not alone in plotting with common conspirators to violate the law is sufficient to raise the necessary inference that he had joined in an overall agreement.").

To prove the necessary "slight connection," the government need not show that Rosca knew all of the co-conspirators or their functions, participated in the conspiracy from its beginning, participated in all its enterprises, knew all its details, or worked with all co-conspirators in a conscious effort to achieve the desired end. *See Herrera-Gonzalez*, 263 F.3d at 1095; *Daily*, 282 F.2d at 820.

Appendix A

II

Rosca next argues that there was an impermissible variance between the single, overall conspiracy charged in the indictment and the evidence presented at trial, which he contends proved the existence of multiple, discrete conspiracies with co-conspirator Moustapha Lofti Eljammal. Our inquiry here is essentially the same as the above sufficiency-of-evidence inquiry. *See United States v. Kenny*, 645 F.2d 1323, 1335 (9th Cir.1981). "To determine whether the evidence supports the existence of one overall criminal venture, relevant areas of inquiry include the nature of the scheme; the identity of the participants; the quality, frequency, and duration of each conspirator's transactions; and the commonality of times and goals." *Brown*, 912 F.2d at 1043 (internal quotation marks omitted). Considering these factors, we are convinced that testimony by witnesses and co-conspirators, physical evidence, and other evidence introduced at trial, when viewed in the light most favorable to the prosecution, support the conclusion that a rational trier of fact could find beyond a reasonable doubt that such a conspiracy existed. Moreover, for the reasons discussed above, we are also persuaded that the evidence was sufficient to connect Rosca with that conspiracy. Accordingly, because sufficient evidence supported a finding of a single, overall conspiracy, we discern no variance from the indictment.[1]

---

1. We also note that the district court gave our model "multiple conspiracies" instruction, informing the jury that "[i]f you find that the conspiracy charged did not exist, then you must return a not guilty verdict on Count 1, even though you may find that some other conspiracy existed. Similarly, if you find that any defendant was not

(Cont'd)

Appendix A

III

Finally, Rosca contends that the district court erred in denying his motion to sever his trial from that of co-conspirator Eljammal. To determine whether the district court abused its discretion in denying the motion to sever, Rosca has the burden to show that a "joint trial would be so prejudicial that the trial judge could exercise his discretion in only one way." *United States v. Escalante*, 637 F.2d 1197, 1201 (9th Cir.1980). In other words, Rosca must "show violation of one of his substantive rights by reason of the joint trial: unavailability of full cross-examination, lack of opportunity to present an individual defense, denial of Sixth Amendment confrontation rights, lack of separate counsel among defendants with conflicting interests, or failure properly to instruct the jury on the admissibility of evidence as to each defendant." *Id.*

Rosca has not satisfied this demanding burden. First, contrary to Rosca's argument, an overwhelming amount of evidence did not relate *solely* to co-conspirator Eljammal. Second, we are unconvinced that the joint trial effectively

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(Cont'd)

a member of the conspiracy charged in Count 1, then you must find that defendant not guilty of Count 1, even though that defendant may have been a member of some other conspiracy." *See United States v. Olano*, 62 F.3d 1180, 1194 n. 6 (9th Cir.1995) ("We note that, even if [the defendants] had established a variance, the error was cured by the district court's instruction to the jury that it could convict a defendant only if it found that he was a member of the conspiracy charged in the indictment, regardless of whether the jury believed that the defendant was part of some other conspiracy.").

deprived Rosca of the ability to present his defense. Third, the district court did not violate Rosca's Sixth Amendment right of confrontation by admitting certain statements by Eljammal, because a co-conspirator's statements made in furtherance of the conspiracy are not testimonial and their introduction does not violate the Confrontation Clause. *See United States v. Allen*, 425 F.3d 1231, 1235 (9th Cir.2005). We are not persuaded that the district court abused its discretion in denying Rosca's motion to sever the joint trial.

For the forgoing reasons, Rosca's conviction is

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING FILED JUNE 26, 2007

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 05-10608

D.C. No. CR-02-01170-DGC

District of Arizona, Phoenix

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

VASILE VALY ROSCA, aka Vaslie Valy Rosca,

Defendant - Appellant.

ORDER

Before: BEEZER, O'SCANNLAIN, and TROTT, Circuit Judges.

The Defendant-Appellant's petition for panel rehearing is DENIED.

No. 07-418

In the Supreme Court of the United States

VASILE VALY ROSCA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
ALICE S. FISHER
Assistant Attorney General
PATTY M. STEMLER
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly determined that the evidence was sufficient to convict petitioner of conspiracy, in violation of 18 U.S.C. 371.

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In the Supreme Court of the United States

No. 07-418

VASILE VALY ROSCA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The decision of the court of appeals (Pet. App. 1a-6a) is not published in the Federal Reporter but is available at 233 Fed. Appx. 605.

JURISDICTION

The judgment of the court of appeals was entered on April 5, 2007. A petition for rehearing was denied on June 26, 2007 (Pet. App. 7a). The petition for a writ of certiorari was filed on September 24, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial, petitioner was convicted in the United States District Court for the District of Arizona of participating in an international automobile smuggling conspiracy, in violation of 18 U.S.C. 371. He was

sentenced to 24 months of imprisonment. The court of appeals affirmed. Pet. App. 1a-6a.

1. Petitioner was part of a conspiracy, primarily located in Canada and Arizona, involving theft of motor vehicles and fraud. Initially, the conspiracy involved only actual motor vehicles that were stolen or wrongfully obtained from various locations in Canada and the United States. After obtaining such a vehicle, a member of the conspiracy would search for a vehicle that was the same make, model, and year as the stolen vehicle, in order to steal the vehicle identification number (VIN) from that vehicle and use it to create a counterfeit VIN plate or fraudulent Canadian vehicle registration for the stolen vehicle. Members of the conspiracy who were employed by the Arizona Department of Motor Vehicles (DMV) then used the fraudulent registrations of stolen vehicles to create clean Arizona titles for those vehicles. Some of those vehicles were distributed to members of the conspiracy for their personal use. Gov't C.A. Br. 10-12.

Members of the conspiracy also committed insurance fraud by creating titles and registrations for vehicles that never existed, insuring those "paper" vehicles, and then claiming that the vehicles had been stolen in order to collect the insurance proceeds. As with the stolen vehicles, members of the conspiracy used "donor" VINs to create fraudulent registration and title paperwork. Gov't C.A. Br. 11, 14-16.

Petitioner participated in fraud involving two stolen vehicles (a 2000 Harley Davidson motorcycle and a 2001 Volkswagen Jetta) and one "paper" vehicle (a 2002 Lexus LX470). Members of the conspiracy created a fraudulent registration for the Harley Davidson motorcycle in Canada, then gave it to a co-conspirator in the Arizona

DMV, who issued a clean title for the motorcycle and registered it to petitioner. Petitioner took possession of the motorcycle and used it for about two years, until law enforcement officers seized the vehicle. The officers discovered that the motorcycle had a counterfeit VIN; when they asked petitioner about the origins of the motorcycle, he told them he could not remember when or where he purchased it. Gov't C.A. Br. 16-20.

Petitioner obtained the 2001 Volkswagen Jetta in a similar manner. A co-conspirator filed a false police report stating that his girlfriend's Jetta had been stolen and submitted a fraudulent insurance claim. He then gave the vehicle to co-conspirators who obtained fraudulent Canadian registration paperwork for it using a "donor" VIN and used that paperwork to obtain a clean title through a co-conspirator at the Arizona DMV. Petitioner took possession of the vehicle and drove it for two weeks before it was seized by law enforcement officers. When confronted by law enforcement officers, petitioner lied about the origins of the vehicle. Gov't C.A. Br. 20-22.

Finally, petitioner attempted to commit insurance fraud based on a 2002 Lexus LX470 that existed only on paper. Co-conspirators created a fraudulent Canadian registration for a 2002 Lexus LX470 using a "donor" VIN, and a co-conspirator at the Arizona DMV processed title and registration documents for that vehicle. Petitioner had the fictional Lexus insured, and then about a month later, he reported to law enforcement authorities that it had been stolen and reported the loss to his insurance company. When law enforcement officers and insurance company representatives asked petitioner about the origins of this vehicle, petitioner provided two different stories, neither of which could be

corroborated. Petitioner eventually withdrew his insurance claim. Gov't C.A. Br. 23-28.

2. Petitioner was charged in a multi-count, multi-defendant second superseding indictment with conspiracy to commit various fraud, theft, and smuggling offenses, in violation of 18 U.S.C. 371; conspiracy to launder money, in violation of 18 U.S.C. 1956(h); and 52 substantive counts of fraud and theft relating to stolen vehicles. C.A. E.R. 3-61 (Second Superseding Indictment); Gov't C.A. Br. 5. All of petitioner's co-defendants except one pleaded guilty. Gov't C.A. Br. 5-8. Petitioner and his remaining co-defendant proceeded to trial. Before and during trial, the government dismissed all counts against petitioner except the first conspiracy count. *Id.* at 8-10. At the close of the government's evidence, petitioner filed a motion for judgment of acquittal on the conspiracy count, which the district court denied. *Id.* at 9-10.

The district court then provided the jury with extensive instructions on the conspiracy count. It first explained the elements of conspiracy:

> In order for the defendants to be found guilty of the conspiracy charge, the government must prove each of the following elements beyond a reasonable doubt:
>
> First, beginning on or about July 1999, and ending on or about November 2002, there was an agreement between two or more persons to commit at least one crime as charged in Count 1 of the Second Superseding Indictment.
>
> Second, each defendant became a member of the conspiracy knowing of at least one of its objects and intending to help accomplish it.

> And, third, one of the members of the conspiracy performed at least one overt act for the purpose of carrying out the conspiracy, with all of you agreeing on a particular act that you find was committed.

3/29/05 Tr. 143. It then made clear that a defendant need not be involved in every aspect of the conspiracy to be convicted:

> One becomes a member of a conspiracy by willfully participating in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy, even though the person does not have full knowledge of all the details of the conspiracy.
>
> * * * * *
>
> Even though a defendant did not directly conspire with other defendants or other conspirators in the overall scheme, the defendant has, in effect, agreed to participate in the conspiracy if it is proved beyond a reasonable doubt that, one, the defendant directly conspired with one or more conspirators to carry out at least one of the object of the conspiracy; two, the defendant knew or had reason to know that other conspirators were involved with those with whom the defendant directly conspired; and, three, the defendant had reason to believe that whatever benefits the defendant might get from the conspiracy were probably dependent upon the success of the entire venture. It is no defense that a person's participation in a conspiracy was minor or for a short period of time.

Id. at 144, 146. The jury found petitioner guilty, and the district court sentenced him to 24 months of imprisonment. Gov't C.A. Br. 10.

3. The court of appeals affirmed in an unpublished, non-precedential opinion. Pet. App. 1a-6a. On appeal, petitioner conceded that the evidence proved a single, overall conspiracy, but he argued that the evidence was insufficient to show that he joined that conspiracy. *Id.* at 2a; Pet. C.A. Br. 19-27.[1] The court of appeals rejected that argument. Pet. App. 2a-4a. It explained that it "review[s] sufficiency of the evidence challenges to determine whether viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 2a (quoting *United States* v. *Herrera-Gonzales*, 263 F.3d 1092, 1095 (9th Cir. 2001), cert. denied, 534 U.S. 1117 (2002)). In this case, those essential elements were that "the overall conspiracy existed" (which petitioner conceded) and that "[petitioner] was connected to the overall conspiracy." *Ibid.*

The court of appeals reviewed the evidence and concluded that the government presented sufficient evidence to connect petitioner to the conspiracy:

> [T]he witness testimony; the recorded interviews with [petitioner]; the insurance application for the "paper" Lexus connected to the conspiracy; the fraudulent purchase order [petitioner] used to support his $68,000 fraudulent insurance claim involving that "paper" Lexus; the fraudulent titles created by co-conspirators for the two stolen vehicles [peti-

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[1] Petitioner also argued that there was an impermissible variance between the indictment and the evidence presented at trial and that the district court erred in refusing to sever petitioner's trial from his co-defendant's trial. Pet. C.A. Br. 28-40. The court of appeals correctly rejected those arguments, Pet. App. 4a-6a, and petitioner does not renew them before this Court.

> tioner] possessed and the "paper" Lexus he insured, all flowing from the conspiracy; as well as other evidence presented at trial offer sufficient support for the district court's conclusion.

Pet. App. 3a. The court of appeals cited settled circuit precedent which explained that "[o]nce the government has established that a conspiracy exists, evidence of only a *slight connection* is necessary to convict a defendant of knowing participation," so long as "each defendant knew or had reason to know of the scope of the conspiracy and that each defendant had reason to believe that [his] own benefits were dependent upon the success of the entire venture." *Ibid.* (brackets in original) (quoting *United States* v. *Brown*, 912 F.2d 1040, 1043 (9th Cir. 1990)). In this case, that meant that the government was not required to show that petitioner "knew all of the co-conspirators or their functions, participated in the conspiracy from its beginning, participated in all its enterprises, knew all its details, or worked with all co-conspirators," so long as it demonstrated petitioner's knowing participation in some portion of the conspiracy. *Ibid.*

ARGUMENT

Petitioner contends (Pet. 5-16) that the court of appeals' decision to uphold his conviction based on a "slight connection" to the charged conspiracy "subverts the requirement of proof beyond a reasonable doubt mandated by the Due Process Clause." As an initial matter, petitioner failed to preserve that claim, and this Court should not address it in the first instance. In any event, petitioner is mistaken, because the court of appeals' standard does require proof beyond a reasonable doubt that a defendant knowingly participated in the

charged conspiracy. Further, there is no conflict in the circuits on this issue, because no court of appeals permits a conviction for conspiracy on anything less than proof beyond a reasonable doubt, and all of the courts use essentially the same standard for explaining the necessary connection between a defendant and the charged conspiracy. Finally, the decision below is unpublished and non-precedential, and petitioner's claim would fail on the merits even under the more stringent standard he advocates. Accordingly, no further review of petitioner's claim is warranted.

1. Petitioner failed to preserve the claim raised in his petition below. On appeal, petitioner's only sufficiency-of-the-evidence challenge was his argument that the evidence that the government presented to connect him to the charged conspiracy was insufficient as a matter of law under Ninth Circuit precedent. Petitioner argued: "[I]t is not sufficient for the government to prove merely that a conspiracy defendant joined in *some* conspiracy. Instead, the government's evidence must show that the defendant participated in the *particular* conspiracy he is charged with having joined." Pet. C.A. Br. 17. Petitioner contended specifically that the evidence failed to show that he "had actual or constructive knowledge of (1) the scope of the *overall* conspiracy, and (2) the fact that his own benefits were dependent upon the success of the entire venture." *Ibid.* (citing *United States* v. *Brown*, 912 F.2d 1040, 1043 (9th Cir. 1990)). Petitioner did not argue, in his opening brief or his reply brief, that the "slight connection" standard violates due process or that the standard itself is otherwise infirm.

Citing *Brown*, the court of appeals rejected petitioner's argument, citing the ample evidence that demonstrated petitioner's knowing connection to the con-

spiracy. Pet. App. 3a. The court of appeals cited circuit precedent containing the "slight connection" standard, but it did not discuss that standard or consider any argument regarding why the standard should be different. *Ibid.*[2]

Petitioner thus failed to preserve his claim that the "slight connection" standard violates due process, and this Court should not consider it in the first instance. See, *e.g.*, *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (Supreme Court ordinarily does not consider questions not pressed or passed upon below).

2. Petitioner's claim (Pet. 15) that the "slight connection" standard "allow[s] convictions based upon a lesser standard than proof of every element of the crime beyond a reasonable doubt" is mistaken. Petitioner confuses the required connection to convict a defendant of conspiracy with the strength of the evidence required to prove that connection. As the Fourth Circuit has explained,

> Requiring that the defendant's connection to the conspiracy be "slight" in no way alleviates the Government's burden of proving the existence of the conspiracy and the defendant's connection to it beyond a reasonable doubt. The term "slight" does not describe the *quantum* of evidence that the Government must elicit in order to establish the conspiracy, but rather the *connection* that the defendant maintains with the conspiracy. Requiring a

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[2] Petitioner filed a petition for panel rehearing, again focusing on the argument that the evidence was insufficient to support his conspiracy conviction under settled Ninth Circuit law. See Pet. C.A. Pet. for Reh'g 7-15. The court of appeals denied the petition for rehearing without opinion. Pet. App. 7a.

> "slight connection" between the defendant and the established conspiracy complements the canons of conspiracy law that a defendant need not know all of his coconspirators, comprehend the reach of the conspiracy, participate in all the enterprises of the conspiracy, or have joined the conspiracy from its inception.

United States v. *Burgos*, 94 F.3d 849, 861 (1996), cert. denied, 519 U.S. 1151 (1997).

The Ninth Circuit similarly has explained that allowing a defendant to be convicted of conspiracy based on a "slight connection" to the activities of the conspiracy does not lessen the government's burden of proving the connection:

> Once the existence of a conspiracy is established, evidence establishing beyond a reasonable doubt a connection of a defendant with the conspiracy, even though the *connection is slight*, is sufficient to convict him with knowing participation in the conspiracy. Thus, the word "slight" properly modifies "connection" and not "evidence." It is tied to that which is proved, not to the type of evidence or the burden of proof.

United States v. *Dunn*, 564 F.2d 348, 357 (1977). Indeed, the Ninth Circuit has expressly rejected the argument petitioner attributes to it, explaining that "the term 'slight connection' in this context *does not mean* that the government's burden of proving a connection is slight." *United States* v. *Esquivel-Ortega*, 484 F.3d 1221, 1228 (2007) (emphasis added).[3]

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[3] See *United States* v. *Anderson*, 189 F.3d 1201, 1207 (10th Cir. 1999) ("A defendant's connection to a conspiracy may be slight, but that slight

Petitioner acknowledges (Pet. 7) the Ninth Circuit's explanation of the difference between the required link to the conspiracy and the quantum of proof required for conviction, but he nonetheless contends that the Ninth Circuit permits a conspiracy conviction based on a "slight connection" to the conspiracy absent any proof of mens rea. Pet. 8 (arguing that the Ninth Circuit's "slight connection" standard "substitutes proof beyond a reasonable doubt of a *slight connection* to the conspiracy for proof beyond a reasonable doubt of a defendant's *knowing participation* in the conspiracy"). The court of appeals, however, did not hold in the decision below or in the cases cited in its decision that proof of a "slight connection" to the conspiracy excuses the government from proving knowing participation in the conspiracy. Instead, it invoked the "slight connection" standard to make clear that a defendant need not be involved in every aspect of the conspiracy to be convicted of conspiracy. Pet. App. 3a. In addition, the court explicitly noted that the government must prove that the defendant "*knew or had reason to know* of the scope of the conspiracy and that [he] had reason to believe that [his] own benefits were dependent upon the success of the entire venture." *Ibid.* (quoting *Brown*, 912 F.2d at 1043 (emphasis added; second set of brackets in original)). Thus, contrary to petitioner's suggestion, the court did not eliminate the mens rea requirement.

3. There is no disagreement in the courts of appeals that warrants this Court's review. Petitioner contends (Pet. 9-11) that the courts of appeals have divided about

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connection must be proven with evidence to establish knowing participation beyond a reasonable doubt." (quoting *United States* v. *Slater*, 971 F.2d 626, 630 (10th Cir. 1992))).

whether "a defendant's knowing participation in a criminal conspiracy must be proven beyond a reasonable doubt." All of the courts of appeals, however, require proof of each element of conspiracy, including mens rea, beyond a reasonable doubt. Although the courts of appeals use slightly different language for articulating the extent to which an individual must participate in the conspiracy to be convicted of conspiracy, the courts' standards are essentially the same, permitting a conviction if the defendant is involved in some—but not necessarily all—aspects of the conspiracy.

First, the courts of appeals have uniformly held that there must be sufficient evidence for a jury to find all elements of conspiracy, including knowing participation, beyond a reasonable doubt to sustain a conviction. See, *e.g.*, *United States* v. *Marsh*, 747 F.2d 7, 13 (1st Cir. 1984) ("Knowledge of the basic 'agreement' * * * is an essential element of the crime charged. It must be proven beyond a reasonable doubt."); *United States* v. *Aleskerova*, 300 F.3d 286, 292 (2d Cir. 2002) (government must prove beyond a reasonable doubt that "the defendant knowingly engaged in the conspiracy with the specific intent to commit the offenses that were the objects of the conspiracy" (internal quotation marks omitted)); *United States* v. *Brodie*, 403 F.3d 123, 134 (3d Cir. 2005) (jury must "find [the defendant] guilty beyond a reasonable doubt" of all elements of conspiracy (brackets in original)); *United States* v. *Wilson*, 484 F.3d 267, 283 (4th Cir. 2007) (government must "prove[] beyond a reasonable doubt that [the defendant] was connected to the existing conspiracy"); *United States* v. *Turner*, 319 F.3d 716, 721 (5th Cir.) (government must prove "knowledge of the conspiracy and intent to join it" beyond a reasonable doubt), cert. denied, 538 U.S. 1017

(2003); *United States* v. *Braggs*, 23 F.3d 1047, 1051 (6th Cir.) (government must provide "sufficient evidence to establish the connection [to the charged conspiracy] beyond a reasonable doubt"), cert. denied, 513 U.S. 902, 513 U.S. 907, and 513 U.S. 933 (1994); *United States* v. *Kellum*, 42 F.3d 1087, 1092 (7th Cir. 1994) (evidence must "establish[] beyond a reasonable doubt that [the defendant] was a knowing participant in the conspiracy"); *United States* v. *Lopez*, 443 F.3d 1026, 1028 (8th Cir. 2006) ("[W]hile a defendant's role in a conspiracy may be minor, the government must offer enough evidence to prove a defendant's connection to a conspiracy beyond a reasonable doubt before a conspiracy conviction can be upheld."); *United States* v. *Zakharov*, 468 F.3d 1171, 1179 (9th Cir. 2006) (government must prove beyond a reasonable doubt that the defendant "had knowledge of the conspiracy and acted in furtherance of it" (internal quotation marks omitted)); *United States* v. *Bowie*, 892 F.2d 1494, 1497 (10th Cir. 1990) ("[T]he defendant's participation in, or connection to, the conspiracy need only be slight, if there is sufficient evidence to establish that connection beyond a reasonable doubt."); *United States* v. *Garcia*, 405 F.3d 1260, 1269 (11th Cir. 2005) ("the government must have proven beyond a reasonable doubt * * * that a conspiracy existed and that the defendant knowingly and voluntarily joined the conspiracy"); *United States* v. *Carson*, 455 F.3d 336, 375 (D.C. Cir. 2006) (trier of fact must find "the essential elements of [conspiracy] beyond a reasonable doubt" (internal quotation marks omitted; brackets in original)).

Petitioner acknowledges that the courts of appeals all "purport to require proof beyond a reasonable doubt of every element of a crime," (Pet. 9), but he argues that

some courts require only "slight evidence" to uphold a conviction, rather than evidence sufficient to permit a rational jury to find guilt beyond a reasonable doubt. Pet. 9-11. This argument again incorrectly conflates the required link to the conspiracy and the quantum of proof required for conviction.

It is true that the courts of appeals have chosen different language to articulate the extent to which a defendant must be involved in a conspiracy to be convicted of a conspiracy offense. The Ninth Circuit, for example, has used the term "slight connection" to explain that the defendant need not have "kn[own] all of the co-conspirators," "participated in the conspiracy from its beginning," or "kn[own] all its details." Pet. 3. The Seventh Circuit uses essentially the same standard, stating that "[s]o long as the evidence demonstrates that the co-conspirators embraced a common criminal objective, a single conspiracy exists, even if the parties do not know one or another and do not participate in every aspect of the scheme." *United States* v. *Jones*, 275 F.3d 648, 652 (2001). Although, as petitioner notes (Pet. 10), the Seventh Circuit has chosen not to use the term "slight connection" so as to avoid any argument that confuses the standard for the required connection to the conspiracy with the burden of proof, see *United States* v. *Durrive*, 902 F.2d 1221, 1227-1228 (1990), the Seventh Circuit's standard does not materially differ from that of any other court of appeals. Indeed, the courts of appeals all agree that a defendant need only be involved in some aspects of a conspiracy to be held responsible for the conspiracy.[4] And this Court held as much in *Salinas* v.

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[4] See, *e.g.*, *United States* v. *Baltas*, 236 F.3d 27, 35-36 (1st Cir.), cert. denied, 532 U.S. 1030 (2001); *United States* v. *Berger*, 224 F.3d 107, 115

United States, 522 U.S. 52 (1997), when it explained that "[o]ne can be a conspirator by agreeing to facilitate only *some* of the acts leading to the substantive offense." *Id.* at 65 (emphasis added). Petitioner asserts (Pet. 9) that "a criminal defendant in one part of the country may be convicted of a violation of the federal criminal statute for conduct that would not constitute a violation if prosecuted in another Circuit," but he points to no cases that would be resolved differently in a different circuit. And there is no reason to expect any divergence, given that the federal circuits all use essentially the same substantive standards.

As explained, all of the courts of appeals require that the government have presented the jury with evidence that, viewed in the light most favorable to the government, establishes every element of conspiracy beyond a reasonable doubt. See pp. 12-13, *supra*. It is true that some courts previously had used the term "slight evidence" to refer to the necessary connection between the defendant and the conspiracy, but those courts have since recognized that the term "slight evidence" confuses the required connection and the burden of proof, and they generally have abandoned that term and used other, new phrases to clarify the required connection and the quantum of proof. Compare, *e.g.*, *United States* v. *Huber*, 772 F.2d 585, 589-590 (9th Cir. 1985) (abandoning "slight evidence" but using "slight connection" to refer to the required connection to the conspiracy), with,

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(2d Cir. 2000); *Brodie*, 403 F.3d at 134; *Burgos*, 94 F.3d at 857-858; *United States* v. *Nelson*, 733 F.2d 364, 369 (5th Cir.), cert. denied, 469 U.S. 937 (1984); *United States* v. *Crayton*, 357 F.3d 560, 573 (6th Cir.), cert. denied, 542 U.S. 910 (2004); *United States* v. *Jenkins*, 78 F.3d 1283, 1288-1289 (8th Cir. 1996); *Bowie*, 892 F.2d at 1497; *United States* v. *Miranda*, 425 F.3d 953, 959 (11th Cir. 2005).

e.g., *United States* v. *Malatesta*, 590 F.2d 1379, 1381-1382 (5th Cir.) (abandoning the term "slight evidence" and using "substantial evidence" to refer to the quantum of proof), cert. denied, 440 U.S. 962 (1979). Moreover, those courts that have decided to use the term "slight connection" to describe a defendant's connection to a conspiracy have taken great pains to make clear that the term does not mean "slight evidence" and does not dilute the burden of proof. See, *e.g.*, *Esquivel-Ortega*, 484 F.3d at 1228; *Burgos*, 94 F.3d at 861; *Marsh*, 747 F.2d at 12-13 & n.3. Because the courts of appeals themselves have been resolving the confusion that the term "slight evidence" caused, and because the differences that remain in the language they use to articulate the required connection between a defendant and a conspiracy are not material, this Court's review is not warranted.[5]

4. In any event, review is unwarranted because resolution of the question petitioner presents would have no impact on the outcome of his case. The jury in this case was not instructed that it could find petitioner guilty based on nothing more than a "slight connection" to the conspiracy. Instead, the district court charged the jury that it could find petitioner guilty only

> if it is proved beyond a reasonable doubt that, one, the defendant directly conspired with one or more conspirators to carry out at least one of the objects of the conspiracy; two, the defendant knew or had

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[5] Petitioner also suggests (Pet. 14) that the Ninth Circuit's "slight connection" standard "circumvent[s] its own conspiracy case law." Petitioner is mistaken, because the "slight connection" standard does not excuse proof of knowing participation in the conspiracy, see p. 11, *supra*, and an intra-circuit conflict would not justify this Court's review in any event. *E.g.*, *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

> reason to know that other conspirators were involved with those with whom the defendant directly conspired; and, three, the defendant had reason to believe that whatever benefits the defendant might get from the conspiracy were probably dependent upon the success of the entire venture.

3/29/05 Tr. 146; see *id.* at 143-144. The jury was thus told that it must find that petitioner knowingly participated in the conspiracy beyond a reasonable doubt, and the jury found petitioner guilty under that standard. On appeal, the court of appeals reviewed the ample evidence that supported the jury's conclusion. Pet. App. 3a. Under any standard, that evidence established a basis for inferring petitioner's general knowledge of the nature of the conspiracy (even if he did not know all of its details) and that his benefits flowed from its overall success. This case thus is not an appropriate vehicle for considering whether the "slight connection" standard dilutes the government's burden of proof, and review should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

ALICE S. FISHER
Assistant Attorney General

PATTY M. STEMLER
Attorney

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